85-1565

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM McCASKILL VAUGHT, JR.,

PETITIONER,

VS.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

1. Did the acceptance of Petitioner's plea guilty, without advising Petitioner of his right to show mitigating facts to authorize a sentence below the minimum seven year sentence, violate Petitioner's rights under Boykin v. Alabama, Rule 11 of the Federal Rules of Criminal Procedure, and the due process clause of the Fourthteenth Amendment?

TABLE OF CONTENTS

	PAGE
Question Presented for Review....	1
Table of Contents	2
Table of Authorities	4
Opinions Below	5
Jurisdiction	5
Constitutional Provisions Involved: United States Constitution . . .	6
Statutes Involved: 1976 South Carolina Code of Laws	
Section 44-53-370(c)	6
Section 44-53-370(d)(3)	7
Section 44-53-370(e)(2)	7
Section 44-53-370	8
Federal Rules of Criminal Procedure, Rule 11	9
Statement	9
Reason for Granting This Writ . . .	11
Conclusion	18
Appendix A: Memorandum Opinion of South Carolina Supreme Court	19
Denial of Petition for Rehearing by South Carolina Supreme Court .	20

TABLE OF CONTENTS CONTINUED

PAGE

Appendix B: Excerpts from Brief filed in South Carolina Supreme Court 21

Appendix C: Excerpts from Transcript of Record 33

Certificate of Service 41

TABLE OF AUTHORITIES

CASES

PAGE

Boykin v. Alabama, 395 U.S. 338..10,11,17

Colson v. Smith, 438 F 2d 1075, (5th Cir. 1971) 12

Mitchell v. Healey, 98, S.Ct. 221, 434 U.S. 874, 54 L Ed. 2d 153... 12

U.S. ex rel. Healey v. Cannon, 553 F 2d 1052 (7th Cir. 1977)... 12

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment..... 6

STATUTES:

Code of Laws of South Carolina, Section 44-53-370 (c)..... 6
Code of Laws of South Carolina, Section 44-53-370(d)(3) 7
Code of Laws of South Carolina, Section 44-53-370(e)(2)..... 7
Code of Laws of South Carolina, Section 44-53-370 8

Rule 11 of the Federal Rules of Criminal Procedure..... 9,11,17

OPINIONS BELOW

The opinions of the Supreme Court of South Carolina are unreported and are printed in Appendix A hereto, infra, page 19.

JURISDICTION

The judgment of the South Carolina Supreme Court (Appendix A, infra, page 19, was entered on December 30, 1985. A timely petition for rehearing was denied on January 21, 1986 (Appendix A, page 20). The jurisdiction of the Court is invoked under 28 U.S.C., Section 1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the statutes and Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "...Nor shall any person be deprived of...liberty...without due process of law...".

STATUTES INVOLVED

(a) "It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this Article." Code of Laws of South Carolina, Section 44-53-370(c).

(b) "Any person who violates subsection (c) with respect to: ...(3)

possession of more than ten grams of cocaine...shall be prima facie guilty of violation of Subsection (a) of this section."...Section 44-53-370(d)(3)

(c) "Any person who knowingly sells, manufactures, delivers, or brings into this State, or who is knowingly in actual or constructive possession of: ...(2) Ten grams or more or any mixture containing cocaine as provided in Section 44-53-210(b)(4) shall be deemed guilty of a felony which shall be known as 'trafficking in cocaine' and upon conviction shall be punished as follows if the quantity involved:...(b) Is twenty-eight grams or more, but less than two hundred grams, a term of imprisonment of not less than seven years nor more than twenty-five years and a fine of Fifty Thousand ($50,000.00) dollars."... Section 44-53-370(e)(2)

(d) "Any sentence imposed under this subsection shall not be suspended and probation shall not be granted except as provided herein until the minimum term of imprisonment prescribed has been served. The Defendant, prior to sentencing, may move by motion, oral or written, for the court to hear and determine mitigating facts and evidence. Upon good cause shown, the court may sentence below the minimum provided herein, provided that such sentencing below the prescribed minimum shall be set out by the Presiding Judge in a written order stating the mitigating facts for such reduced sentence or refusal to reduce the minimum sentence. The prosecution and defendant may call witnesses and present evidence for reduction of sentence or for the imposition of the prescribed sentence." Code of Laws of South Carolina, Section 44-53-370

(e) "...The Court...shall not accept the plea without first determining that the plea is made voluntarily and with an understanding of the nature of the charge." Fed. Rules of Crim. Proc., Rule 11.

STATEMENT

On June 1, 1984, Petitioner, a thirty-three year old college graduate and active cocaine addict with no prior criminal record, picked up thirty-eight grams of cocaine from a mailbox. He was arrested on June 5, 1984 and charged with trafficking in cocaine. On October 3, 1984, while steadfastly maintaining that "I'm not a drug dealer, I'm just a drug user," Petitioner entered his plea to trafficking in cocaine. Two days later, at the sentencing hearing, while he continued to profess that he was merely a

drug user, not a dealer, Petitioner revealed his understanding that he could receive probation. (Tr. 13-1). In the face of this contention, neither the Court nor Petitioner's counsel informed Petitioner of his right to show mitigating facts to authorize a sentence below the statutory minimum, or even probation. (Tr. 11-10). Shortly thereafter, Petitioner was sentenced to imprisonment for twenty-five years and fined Fifty Thousand Dollars, the statutory maximums.

Petitioner subsequently appealed to the South Carolina Supreme Court, arguing that his plea was accepted in violation of the principles enunciated in Boykin v. Alabama, and on the grounds, inter alia,

that Petitioner's counsel misunderstood applicable law and ineffectively assisted Petitioner.

REASON FOR GRANTING THIS WRIT

The principles of Boykin v. Alabama, codified in Rule 11 of the Federal Rules of Criminal Procedure, represent more than a sterile checklist of general questions to be passively read to the accused. Boykin recognizes that judges are charged with an affirmative duty of making reasonable inquiry at sentencing to insure that defendants reasonably understand the elements of the charges against them and the actual and potential consequences of guilty pleas.

Moreover, an equally important aspect of this duty is to protect the accused's right to the benefit of

reasonably competent counsel in making his plea. Colson v. Smith, 438 F 2d 1075 (5th Cir. 1971); U.S. ex. rel. Healey v. Cannon, 553 F. 2d 1052 (7th Cir. 1977), cert. den., Mitchell v. Healey, 98 S. Ct 221, 434 U.S. 874, 54 L Ed. 2d 153. The record herein permits no other inference but that Petitioner either had not been advised or had been misadvised by counsel regarding the special statutory showing a defendant had to make before the trial court could even consider probation or a reduced sentence.

The trial judge was not familiar with the sentencing procedures under the statutes involved, or if he was, neither he nor Petitioner's counsel correctly informed Petitioner. See Appendix C, Page 33, Excerpts from Transcript of Record. There was confusion as to the

applicable law governing Petitioner's sentencing. Petitioner's counsel stated Petitioner was being sentenced "under the old law".

Court: "Can't be.

Counsel: Yes sir. The new law didn't pass until 6th, 1984. This happened before that.

State's Attorney: Your Honor, of course, I think there have been a couple of new laws lately. the sentence that ---

Court: Well, you point out the new law, because I've got the one sent to me last year, and I'm still using it on trafficking. Now, is there any difference from last year?

Counsel: Yes sir.

State's Attorney: Judge, they passed a law ---

Court: Show me.

State's Attorney: All right, I've got a copy of it here. They passed a law June the 19th of this year, and the difference, as is pertinent to this particular case is, is really none, because in Mr. ---

Court: Well, I've got this. Twenty-eight grams or more, but less than two hundred grams, not less than seven years nor more than twenty-five years, and a fine of Fifty Thousand Dollars.

State's Attorney: That is the correct sentence in his case."

After this colloquy the court asked Petitioner if he wished to plead guilty "knowing that the sentence is not less than seven nor more than twenty-five, and a fine of Fifty Thousand Dollars", without informing Petitioner he could move

to make a showing to be sentenced to probation or less than the minimum. Immediately before he imposed the maximum sentence, the trial judge stated that:

> "Under this law it says, any sentence imposed under the following subsections -- and this happens to be one of the sub-sections -- related to trafficking, shall not be suspended, and pro-bation shall not be granted, except as provided herein, until the mini-mum term of imprisonment has -- prescribed has been served.
>
> What's the matter?
>
> Counsel: Said he didn't know he couldn't get probation, Your Honor.
>
> Court: I just can't -- I've got to sentence him to the maximum, and

then the day -- he's got to do seven years before he can even be considered by the Board, because -- of course, there's a provision, but you're going to have to go a whole lot -- have been gone, and I doubt if you can go that route.

Sister of Defendant: You Honor, can I say something, please?

Court: Yes mam. What have you got to do with this?

Sister: He is my brother, and I have lost my only child, and my husband is very ill, and if you could do your best for him, I would appreciate it.

Court: Well, mam, it's set out by law what I've got to do. I can't change the law. The Legislature is the only one that can change it.

I feel sorry for him, but he's got himself into this, and I'm just as sorry as I can be, but I have a job to do, and I must carry it out."

Neither the trial judge or counsel ever informed Petitioner that he could move to present testimony and evidence to persuade the court to sentence Petitioner to less than the minimum. In his Brief below Petitioner argued that Petitioner had not pled guilty voluntarily because he had not been properly informed. The contraints of Rule 11 and Boykin were fully argued.

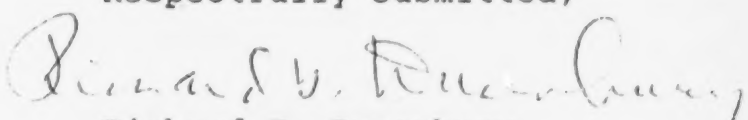
Since Petitioner's counsel made no motion to make a showing to sentence below the minimum, Petitioner could not receive probation or a sentence less than the minimum. Petitioner's Writ should be granted to stand for the proposition that

trial judges should be required to intelligently inform defendants concerning the sentencing alternatives, including any right to make a showing which would affect the alternatives, thereby ensuring the existence of a written record on review that will show, not only that the defendant was informed and understood his possible sentence, but that the sentencing judge himself understood the sentences that he could impose and the defendant could receive.

CONCLUSION

For the foregoing reasons Petitioner's plea should be vacated and he should be allowed to plea anew.

Respectfully submitted,



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APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

William McCaskill Vaught, Jr., Appellant.

Appeal from Horry County
Paul M. Moore, Special Circuit Judge

Memorandum Opinion No. 85-MO-318
Submitted September 18, 1985
Filed December 30, 1985

AFFIRMED

Richard G. Dusenbury, of Florence, for Appellant.

Attorney General T. Travis Medlock, Assistant Attorney General Harold M. Coombs, Jr., both of Columbia; and Solicitor James O. Dunn, of Conway, for Respondent.

PER CURIAM: Affirmed pursuant to Supreme Court Rule 23.

/s/ J. B. Ness C J
/s/ George T. Gregory, Jr. A J
/s/ David W. Harwell A J
/s/ A. Lee Chandler A J
/s/ Ernest A. Finney, Jr. A J

THE SUPREME COURT OF SOUTH CAROLINA

January 22, 1986

Mr. Richard G. Dusenbury
201 West Evans Street
Florence, South Carolina 29503

Re: The State v. William McCaskill Vaught, Jr.

Dear Mr. Dusenbury:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition Denied.

/s/ J. B. Ness C. J.
/s/ George T. Gregory,Jr A. J.
/s/ David W. Harwell A. J.
/s/ A. Lee Chandler A. J.
/s/ Ernest A. Finney,Jr. A. J.

January 21, 1986."

The remittitur in this matter is today being forwarded to the Clerk of Court for Horry County.

Sincerely yours,

/s/ Clyde N. Davis, Jr.
CLERK

CND,Jr/krp

cc: The Honorable Harold M. Coombs, Jr.
James O. Dunn, Esquire

APPENDIX B

Petitioner raised constitutional questions below as shown by the following excerpts from Brief filed in the South Carolina Supreme Court:

> "At the time Appellant entered his guilty plea on October 3, 1984, the only constitutional right which the Court informed Appellant he was giving up by entering a guilty plea was his right to a jury trial. (Tr. 3-10) The only facts concerning the sentencing consequences of entering a guilty plea of which the Court informed Appellant of was that the sentence involved was not less than seven years nor more than twenty-five years and a fine of Fifty Thousand ($50,000.00) Dollars. (Tr. 4-21)

On the day Appellant's plea was accepted, a Wednesday, neither the Court nor Appellant's attorney informed Appellant whether he could or could not be given a probationary sentence. On the day Appellant's plea was accepted, (Wednesday) the Court did not inquire into the facts in the case and did not hold a colloquy or conduct an inquiry with Appellant to determine that Appellant understood the nature of the charges against him, that is, the difference between illegal possession, possession with intent to distribute, and trafficking. Nor did the Court inform Appellant of the extent of the Constitutional rights he was giving up by pleading guilty, asking him

only about his willingness to give up his right to a jury trial." ...

"Appellant evidently had not been advised by his counsel prior to sentencing what sentence the offense he was charged with could involve. This is obvious from the following colloquy: The Court (Tr. 13-1) informed Appellant that a sentence 'relating to trafficking shall not be suspended, and probation shall not be granted, except as herein provided, until the minimum term of imprisonment has - prescribed has been served. What's the matter?'

Mr. McInnis: 'Said he didn't know he couldn't get probation Your Honor.'

Neither the Court nor Appellant's counsel at this point in-

formed the Appellant or each other that the Court did in fact have authority in its discretion under the law prior to June 17, 1984, to suspend to less than the minimum sentence, or even grant probation, provided the Court, for good cause shown, set forth in a written Order the mitigating facts for such reduced sentence.

The primary requirements of Rule 11 are that the Court, before accepting the guilty plea, must first determine 'that the plea is made voluntarily with an understanding of the nature of the charge.' Approximately one minute before Appellant was sentenced to twenty-five years and Fifty Thousand ($50,000.00) Dollars, he

was anxiously telling his lawyer that he didn't know he couldn't get probation. His lawyer does not state in the record whether he had or had not told his client that he could not get probation or a sentence less than the otherwise minimum seven years. Nor did the Court or counsel, even after Appellant raised the question of the sentence, inform Appellant about the provision in the statute whereby he could 'move by motion, oral or written, for the Court to hear and determine mitigating circumstances for the Court for good cause shown to sentence below the prescribed minimum.'"...

"The record suggests, but does not indicate definitely, that the

Court started to mention the provision in the statute that permits sentencing below the minimum but stopped short of doing so. Right after being informed that Appellant didn't know he couldn't get probation, the Court (Tr. 11-10) stated:

> 'I just can't - I've got to sentence him to the maximum, and then the day - he's got to do seven years before he can even be considered by the Board, because - of course, there's a provision (Emphasis added.), but you're going to have to go a whole lot - have been gone, and I doubt if you can go that route.'

It is not clear what the Court meant here or what provision it was

referring to or what route the Court was referring to. In any event, in just twenty-two more lines in the Transcript Appellant was sentenced to twenty-five years and fined Fifty Thousand ($50,000.00) Thousand Dollars.

South Carolina recognizes the constitutional requirements enunciated in Boykin v. Alabama, 395 U.S. 338, and, in general, the requirements imposed by Rule 11 of the Federal Rules of Criminal Procedure as they relate to the acceptance of guilty pleas.

In State v. Armstrong, 211 S.E. 2d 889, the South Carolina Supreme Court affirmed in principle the requirements of Rule 11 of the Federal Rules of Criminal Proce-

dure, but did not subscribe to any particular list of Rule 11 requirements." ...

"Part of the rationale for Rule 11 and Boykin is to ensure that the defendant pleads guilty voluntarily. Inextricably connected with this is the additional requirement that the defendant plead guilty intelligentl_, that is, that he understands the nature of the crime charged and the possibilities of his entering a guilty plea. Stated another way, the defendant must understand all the consequences he can suffer from pleading guilty in order to make an intelligent voluntary decision to do so. In this case, the consequences of a guilty plea involved a rather unusual

statute, that is, the legislature in one provision of the statute imposed a mandatory minimum sentence but at the end of the statute included a qualifying provision that allowed a defendant to make a showing of mitigating factors which would authorize the court to sentence below the minimum. Presumably, since the statute does not set any limit on the court's authority to sentence below the minimum, he could even be given probation.

The inescapable conclusion in this case is that Appellant was never informed by his counsel or the court of this available 'consequence' or 'possibility' of the sentence. Approximately sixty

seconds before the Judge passed sentence, Appellant informed his counsel and his counsel, in turn, informed the court of Appellant's belief that he possibly could get probation.

At this point Appellant was entitled to know of this special provision in the statute in order that he and his counsel could make a decision almost as crucial as a decision as to whether or not to actually plead guilty, that is, the decision as to whether or not to make the showing permitted under the statute that might persuade the court to sentence below the minimum. The record is silent as to whether the court or counsel was aware of the mitigating provision;

certainly the record does not establish that Appellant was intelligently informed of this provision.

The Defendant is entitled to be informed of sentencing possibilities, including statutory minimums. See, e.g., United States ex rel. Hill v. Ternullo, 510 F 2d 844 (2nd Cir. 1975), Hunter v. Fogg, 616 F 2d 55 (1980). Hunter is a Second Circuit case that deals specifically with the Rule 11 requirement that a defendant be informed of the minimum mandatory sentence that the Court must impose." (Text of quotation omitted.) ...

"Finally, the record does not show that Appellant was ever

informed of the miminum mandatory sentence or his right to show facts in mitigation to try to persuade the Judge to sentence under the minimum mandatory sentence." ...

APPENDIX C

Excerpts from Transcript of Record regarding sentencing procedures and penalties involved:

"Court: Are you pleading guilty because you are guilty of trafficking with thirty-eight point two-two grams of cocaine?

A. Yes sir.

Court: On or about June 1st, 1984?

A. Yes sir.

Mr. McInnis: Your Honor, that's under the old law.

Court: Can't be.

Mr. McInnis: Yes sir. The new law didn't pass until 6th, June, 1984. This happened before that.

Mr. Martin: Your Honor, of course, I think there have been a couple

of new laws lately. The sentence that ---

Court: Well, you point out the new law, because I've got the one sent to me last year, and I'm still using it on trafficking. Now, is there any difference from last year?

Mr. McInnis: Yes sir.

Mr. Martin: Judge, they passed a law ---

Court: Show me.

Mr. Martin: All right, I've got a copy of it here. They passed a law June the 19th of this year, and the difference, as is pertinent to this particular case is, is really none, because in Mr. ---

Court: Well, I've got this. Twenty-eight grams or more, but less than two hundred grams, not less

than seven years nor more than twenty-five years, and a fine of Fifty Thousand Dollars.

Mr. Martin: That is the correct sentence in his case.

Mr. McInnis: That is correct.

Court: All right, well now, what is the other one?

Mr. Martin: The new law is changed, Judge, until -- it's changed from -- twenty-eight to one hundred grams is still seven to twenty-five, from one hundred up is mandatory twenty-five years, without parole.

Mr. Innis: That's the new law.

Court: Okay. That's not involved here.

Mr. Martin: That's not applicable in this case.

Court: Okay. Knowing that the

sentence is not less than seven, nor more than twenty-five years, and a fine of Fifty Thousand Dollars, do you still wish to plead guilty?

A. Yes sir. Could I speak with you for a second?

Court: Well, you can speak, but I just want to know whether you still want to plead guilty or not.

You're going to have plenty of time to talk to the Court.

Talk to your lawyer.

(AFTER CONFERRING WITH HIS COUNSEL.)

Mr. McInnis: He just wants to make sure that I make you aware that he does need some treatment along with ---

Court: Well, you've got plenty of time to do that. If he's got a problem, I'm going to recommend

some help. I always do.

A. Thank you, Your Honor.

Court: All right, knowing what the maximum sentence is, you still want to plead guilty?

A. Yes sir.

Court: All right, let the record show his plea is free and voluntary, that the Court will accept his plea.

Mr. Vaught: No sir, just I'm not a drug dealer, I'm just a drug user, if that makes any difference. I know it doesn't justify anything.

Court: Yes, but the only thing about it is, you got into that category of what the new law calls trafficking....Under this law it says, any sentence imposed under the following subsections ---

and this happens to be one of the subsections -- related to trafficking, shall not be suspended, and probation shall not be granted, except as provided herein, until the minimum term of imprisonment has -- prescribed has been served. What's the matter?

Mr. McInnis: Said he didn't know he couldn't get probation, Your Honor.

Court: I just can't -- I've got to sentence him to the maximum, and then the day -- he's got to do seven years before he can even be considered by the Board, because -- of course, there's a provision, but you're going to have to go a whole lot -- have been gone, and I doubt if you can go that route.

Sister of Defendant: Your Honor, can I say something, please?

Court: Yes mam. What have you got to do with this?

Sister: He is my brother, and I have lost my only child, and my husband is very ill, and if you could do your best for him, I would appreciate it.

Court: Well, mam, it's set out by law what I've got to do. I can't change the law. The Legislature is the only one that can change it. I feel sorry for him, but he's got himself into this, and I'm just as sorry as I can be, but I have a job to do, and I must carry it out. Fine looking man. He's got no business up here, because you could have made a

living, without all this, but you just -- when you associate with people, you get down in the gutter with people that are criminals, you're -- going to rub off on you. It's just common knowledge. It absolutely happens. Very few survive. Very few ever survive.

William McCaskill Vaught, Jr., the sentence of the Court is, you be confined to the South Carolina Department of Corrections for twenty-five years, and pay a fine of Fifty Thousand Dollars."

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, hereby certifies that on the 21st day of March, 1986, three copies of Petitioner's Petition for Writ of Certiorari were served upon counsel for Respondent by mailing the same to Mr. Harold M. Coombs, Jr., Assistant Attorney General, Post Office Box 11549, Columbia, South Carolina 29211.

Richard G. Dusenbury
Attorney for Petitioner